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IN THE

Supreme Court of the United States

October Term, 1961

No. 886

SALVATORE FRASCONE,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioner, Salvatore Frascone, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered against him in the above entitled case on March 23, 1961.

A. The Opinion Below

The opinion of the Court of Appeals in this case has not as yet been officially reported. It is set forth in Appendix A annexed to this petition.

B. Jurisdiction

The judgment of the Court of Appeals was entered on February 5, 1962. On March 19, 1962, a petition for rehearing thereof was denied by said court. The jurisdiction of this Court is invoked under Rule 19 of the Supreme Court Rules and Title 28, United States Code, Section 1254(1) on the ground that review by the Supreme Court by writ of certiorari is sought of a judgment of affirmance on appeal by the United States Court of Appeals for the Second Circuit.

C. Question Presented

Was the privilege against self-incrimination improperly extended to a "special employee" of the Bureau of Narcotics, when the Government as part of its direct case alleged that the said "special employee" introduced the petitioner to a narcotics agent, and yet when the "special employee" was thereafter called as a defense witness and questioned about the introduction, was allowed to invoke the Fifth Amendment?

D. Constitutional Provisions and Statutes

The Constitutional provisions and statutes involved are:

1. United States Constitution, Amendment V.
2. United States Code, Title 21, Sections 173 and 174.

E. Summary Statement of Matters Involved

A four count indictment was returned against the petitioner alleging the crime of illegal sale of narcotics. He was found guilty as charged and thereafter sentenced to seven (7) years imprisonment and fined four thousand ($4,000.00) dollars. The petitioner is now serving said sentence.

F. Reason for Granting the Writ

When the Government, as part of its direct case, alleged that a Special Employee of the Bureau of Narcotics introduced the Petitioner to an Agent of the Bureau of Narcotics, the Special Employee cannot when thereafter called as a defense witness and questioned as to the said introduction, invoke the Fifth Amendment:

One Joseph Bove, a "special employee" of the Bureau of Narcotics was identified by a narcotics agent as the person who introduced the petitioner to him. The "special employee" was not called as a prosecution witness. He was the only person, other than the petitioner, who might have contradicted the narcotics agent as to the aforesaid introduction and identification.

Immediately after Bove was sworn as a witness he received erroneous advice from the Court as to the privilege against self-incrimination. He was advised that he need not answer if he felt that by doing so he might degrade or incriminate himself. The Court of Appeals relying on *Brown v. Walker*, 161 U. S. 591 (1896) held that the privilege did not extend to matters which might degrade but

did not incriminate. However, it felt that the error did not warrant a reversal. Bove thereupon declined to answer every question put to him by petitioner's counsel, including the following which pivoted upon the issue of identification.

> "Q. Did you ever introduce Salvatore Frascone to one Charles McDonnell, a narcotic agent? A. I refuse to answer. I take the Fifth.
>
> Q. Did you ever tell Agent McDonnell, or anybody else connected with the Bureau of Narcotics, or any member of the United States Government—(interruption omitted)—that you knew Salvatore Frascone to be the same party called Johnny? A. I refuse to answer. I take the Fifth for the same reason.
>
> Q. Did you ever introduce Charles R. McDonnell to one Johnny as a gentleman from New Jersey? A. I refuse to answer. I take the Fifth for the same reason."

A negative, or even a dubious answer which could be pursued on cross-examination, might well have served to exculpate the petitioner. Yet the right to pursue this issue was denied.

It has been held that the privilege against incrimination is not a protective blanket to be asserted wantonly or without regard to the rights of others. To the contrary it can be asserted only when a witness has reasonable cause to apprehend danger from a direct answer. *Mason* v. *United States*, 244 U. S. 362 (1917). For, as has been held by this Court in *Hoffman* v. *United States*, 341 U. S. 479, 486 (1951):

> "The witness is not exonerated from answering merely because he declares that in so doing he would

incriminate himself—his say so does not of itself establish the hazard of incrimination. It is for the court to say whether his silence is justified, Rogers v. United States, 340 U. S. 367, ante, 344 71 S. Ct. 438, 19 ALR 2d 378 (1951), and to require him to answer if 'it clearly appears to the court that he is mistaken.' Temple v. Commonwealth, 75 Va. 892, 899 (1881)."

The privilege against self-incrimination thus cannot be irresponsibly utilized by a witness. Particularly is this so when confronted with the basic right of a defendant in a criminal prosecution to the use of the testimony of every competent person who may have knowledge of material and pertinent facts. The patent prejudice which beset the petitioner in the instant cause can best be realized by the stark fact that Bove, a "special employee" of the United States Government refused to give material testimony concerning his activities on behalf of the Government, as they affected the petitioner. The questions posed were in no way applicable to any possible criminal conduct on the part of Bove. They related solely to his activities in aid and furtherance of the activities of federal narcotics agents. How can the Government utilize such conduct and yet violate the fundamental precept of allowing an inquiry thereto? Is the mantle of the Fifth Amendment to be extended so as to preclude the right of cross-examination on an issue as basic as identification of one allegedly introduced by a "special employee" to a narcotics agent. The privilege against self-incrimination is a shield against police power. To allow it to be utilized in furtherance of the powers of law enforcement agents and the deprivation of the rights of a defendant to the testimony of witnesses of his choosing is an abuse of judicial power.

CONCLUSION

For the reasons hereinabove set forth this petition for a writ of certiorari should be granted.

Respectfully submitted,

ALBERT J. KRIEGER
THEODORE KRIEGER
Attorneys for Petitioner

APPENDIX A

Opinion by the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 79—September Term, 1961.

(Argued October 9, 1961 Decided February 5, 1962.)

Docket No. 26944

UNITED STATES OF AMERICA,

Appellee,

—v.—

SALVATORE FRASCONE,

Appellant.

Before:

CLARK, WATERMAN and MOORE,

Circuit Judges.

Appeal from the United States District Court for the Southern District of New York, Noonan, *J.*

After a jury trial appellant was convicted on four counts of an indictment charging him with making illegal sales of narcotics. Judgment of conviction affirmed.

ROBERT M. MORGENTHAU, United States Attorney, Southern District of New York (David Klingsberg, Arthur I. Rosett, Asst. U. S. Attorneys, of counsel), for *Appellee.*

EARL J. MCHUGH, New York City, for *Appellant.*

Appendix A

WATERMAN, *Circuit Judge*:

After a jury trial in the United States District Court for the Southern District of New York, appellant, Salvatore Frascone, was convicted on four counts of an indictment charging him with making illegal sales of narcotics. On this appeal we affirm the conviction.

At appellant's trial three agents of the Federal Bureau of Narcotics testified for the prosecution. Agent Charles R. McDonnell testified that on October 6, 1958, at 116th Street and Madison Avenue in New York City, Joseph Bove, a special employee, or informer, working for the Bureau of Narcotics, introduced him to a man called "Johnny," who was later identified as appellant. At that meeting McDonnell told appellant that he wished to purchase heroin. Appellant offered to get McDonnell an ounce of "pure" for $400. The agent answered that he only wanted half an ounce. Frascone asked McDonnell where he could be reached, McDonnell gave Frascone his telephone number, and Frascone said that he would call him the next evening.

All the while narcotics agent Patrick Biase had this meeting under surveillance. He testified that after the conversation related above appellant entered a 1948 Plymouth and drove to the Vivere Bar and Grill at Second Avenue and 10th Street.

McDonnell testified that on the next day, October 7, Frascone called him as promised, and pursuant to the call they met at 10th Street and Second Avenue. After Frascone entered McDonnell's automobile, the agent drove

around the block and stopped at 11th Street and Second Avenue, as Frascone had instructed him to do. There appellant got out of McDonnell's car and walked to a Cadillac parked nearby. Then appellant reentered the agent's car and gave McDonnell a small brown package, for which the agent paid $200. Frascone asserted that the package contained a full ounce of heroin and therefore McDonnell owed him another $200. McDonnell said that he would have to see Frascone the next day about the additional money. Frascone acquiesced. Agent Biase, who had observed the first meeting between McDonnell and appellant, was also observing the meeting of October 7. He testified that after McDonnell left, appellant went into the Vivere Lounge. The next day McDonnell paid Frascone the additional $200.

An analysis of the contents of the package which Frascone had given McDonnell revealed that it contained 395 grams, slightly less than one ounce, of heroin.

The next contact between appellant and the narcotics officers, McDonnell testified, was a telephone call by appellant to McDonnell on November 21, 1958, in which appellant offered to sell him several more ounces of heroin. They agreed on a price of $280 for this purchase. McDonnell met Frascone at 10th Street and Second Avenue once again. McDonnell was accompanied by another agent, Jack R. Peterson, whom McDonnell introduced to appellant as the man who would pick up the narcotics for McDonnell in the future. After a brief conversation held privately between McDonnell and appellant, McDonnell counted out $300 and gave it to agent Peterson. McDonnell then left Peterson alone with Frascone.

Appendix A

Agent Peterson testified that he and Frascone walked over to Avenue A. There Frascone told the agent that the heroin was under the front seat of a car parked on that avenue near the corner of 11th Street. To identify the correct car, Frascone walked up to it and lit a cigarette. It was the same 1948 Plymouth that appellant had driven on October 6. Then Peterson entered the car and found under the front seat two glassine envelopes containing white powder. Peterson examined the powder as best he could and concluded that it was heroin. He rejoined Frascone, who had been standing nearby, and paid him $280 for the two envelopes.

A subsequent laboratory analysis proved the white powder to be approximately two ounces of heroin.

On December 5, 1960, a four count indictment was filed against Frascone, charging him with making illegal sales of narcotics. Counts one and two related to the sales of October 7, 1958. Count one charged a violation of narcotics laws, 46 Stat. 586 (1930), 21 U. S. C. §173 (1958), and 70 Stat. 570 (1956), 21 U. S. C. §174 (1958). Count two charged a violation of Int. Rev. Code of 1954 §§4701, 4703, 4704(a), 4771(a), which impose a federal tax on narcotics. Counts three and four related to the sale of November 21, 1958, and, respectively, charged Frascone with violations of the same narcotics acts as did counts one and two. After a trial lasting three days Frascone was convicted on March 2, 1961, on all four counts of the indictment and sentenced to seven years imprisonment and a fine of $4,000. Frascone now appeals to this court from the judgment entered upon that conviction.

Appendix A

Upon this appeal Frascone first asserts that the trial judge committed reversible error in his explanation to the informer, Bove, called as a witness by the defense, concerning Bove's privilege against self-incrimination. The court advised Bove of his right in these terms:

> The Court: Mr. Bove, you have been brought down here by the marshal?
>
> The Witness: I was.
>
> The Court: Well, I wish to advise you that under the Fifth Amendment of the Constitution—you may be seated—
>
> The Witness: Yes.
>
> The Court:—you may refuse to answer any questions that might be asked if you feel that they might tend to degrade or incriminate you.

To most of the questions asked him on direct examination by defense counsel Bove replied, "I refuse to answer on the ground that it may tend to incriminate or degrade me," or, simply, "I take the Fifth Amendment." Appellant has especially called to our attention three of the questions which the informer refused to answer:

> Q. Did you ever introduce Salvatore Frascone to one Charles McDonnell, a narcotic agent? A. I refuse to answer. I take the Fifth.
>
> Q. Did you ever tell Agent McDonnell, or anybody else connected with the Bureau of Narcotics, or any member of the United States Government—(interruption omitted)—that you knew Salvatore Frascone to be the same party called Johnny? A. I refuse to answer. I take the Fifth for the same reason.
>
> Q. Did you ever introduce Charles R. McDonnell to one Johnny as a gentleman from New Jersey? A.

I refuse to answer. I take the Fifth for the same reason.

At the trial defense counsel made a specific objection to this reliance by his witness on the Fifth Amendment. He only objected on the ground that Bove could not assert his right against self-incrimination "unless he conveys the degrading or incriminating circumstances which would entitle him to the use of it, and those circumstances must be conveyed to your Honor, to find out whether he is justified in his position, or because he is just acting capriciously because he wants to have it done that way, but that is not a right under the Fifth Amendment." Indeed the trial court's advice to the witness was erroneous, for the privilege against self-incrimination does not protect one from testifying to matters which might degrade him without also incriminating him. *Brown v. Walker*, 161 U. S. 591, 605-606 (1896). However, the single ground upon which appellant's trial counsel based his specific objection to the witness's assertion of privilege was untenable. To require one to relate the circumstances which he thinks entitle him to assert his privilege against self-incrimination would cause him while asserting the privilege to lose the protection the privilege guarantees. *Hoffman v. United States*, 341 U. S. 479, 486-87 (1951). Generally, if the objection is based upon an untenable ground a specific objection made at trial to the exclusion of evidence cannot be relied upon for a reversal even though a valid ground for objection existed. See *United States v. Sing Kee*, 250 F. 2d 236 (2 Cir. 1957), *cert. denied*, 355 U. S. 954 (1958); *Norwood v. Great Am. Indem. Co.*, 146 F. 2d 797 (1944); Wigmore, Evidence § 18 at 339-40 (3d ed. 1940). As we stated in *U. S.*

Appendix A

v. *Sansone*, 231 F. 2d 887, 891, *cert. denied*, 351 U. S. 987 (1956):

> While we may in our discretion notice errors not brought to the attention of the trial court, Rule 52(b), Federal Rules of Criminal Procedure, 18 U. S. C., this discretion will not be exercised to reverse a conviction based on ample evidence unless the errors have seriously prejudiced the defendant or affected the fairness, integrity, or public reputation of judicial proceedings. See United States v. Atkinson, 1936, 297 U. S. 157, 160, 56 S. Ct. 391, 80 L. Ed. 555; United States v. Jones, 7 Cir., 1953, 204 F. 2d 745, certiorari denied, 346 U. S. 854, 74 S. Ct. 67, 98 L. Ed. 368, rehearing denied 346 U. S. 905, 74 S. Ct. 216, 98 L. Ed. 404.

If it were demonstrated from the trial record that the trial court's uncorrected mistake would result in a miscarriage of justice, we would conceive it our duty to overlook counsel's failure properly to support his objection. But no such injustice has occurred here. It is inconceivable to us that Bove would have answered the questions asked him by the defense if he had received proper advice as to the scope of his rights under the Fifth Amendment. He would not have said to himself, "I am willing to incriminate myself but am unwilling to degrade myself—therefore, I shall answer the questions." And under the liberal formulation of the self-incrimination privilege announced in *Hoffman v. United States*, 341 U. S. 479 (1951), Bove had a right not to answer any of the important questions asked him. It was not perfectly clear that the answers to any of these questions could not possibly have tended to incriminate him. They might have led to the disclosure that Bove had been associated with a narcotics ring of which the authori-

ties were not yet aware, or that he had committed more drug violations than those for which he had already been convicted. A few questions which Bove refused to answer, as the inquiry about his age, would not appear to have required incriminating answers, but, if answered, would not have advantaged the defense. Nor did counsel by making an offer of the testimony he had expected his witness to give apprise the judge of how Frascone could have been prejudiced by Bove's silences. Appellant has not persuaded us that this alleged trial error of which he complains prejudiced him.

Appellant also argues that the prosecutor made several improper remarks during his summation to the jury. Two of these statements were:

> Now, are we railroading this poor defendant to jail? That is the only issue.
>
> Is [the U. S. chemist] also to be considered as a part of this great conspiracy, presumably of which I am a member, too, to send this man to jail?

At trial appellant's counsel failed to object to this part of the prosecutor's summation. The prosecutor also stated in his closing speech to the jury:

> [I]t would be improper by and large to be considered by you that this man was suspected of being part of an organization known as the Valachi organization.

Defense counsel objected to this remark and moved for a mistrial, claiming that no testimony had been offered which connected appellant with such an organization. The court denied the motion for a mistrial but told the jury to disregard the prosecutor's comment.

We find none of these statements a sufficient basis for reversing the conviction. Although the prosecutor's remarks about railroading Frascone to jail were uncalled for, they were not so prejudicial—especially in the light of the impressive evidence against appellant—that we can ignore appellant's failure to object to them at the trial. *United States* v. *DeFillo*, 257 F. 2d 835, 840 (1958), *cert. denied*, 359 U. S. 915 (1959). The name of Joe Valachi came into the testimony when, upon cross-examination of Agent McDonnell, defense counsel pressed the agent to reveal whether the narcotics authorities were really looking for someone else when they used Bove and apprehended Frascone. McDonnell answered they had an idea they might reach Joe Valachi, who he then asserted was one of the leading narcotics violators in this country. Therefore, the referral by the prosecutor in his summation to the Valachi organization was proper. The trial judge's instruction to the jury to disregard the prosecutor's statement more than adequately cured any possible imputation that he had acted unfairly.

We now come to appellant's third ground for reversal. While cross-examining Agent McDonnell, defense counsel asked him:

> Q. Where did you learn the name Frascone from?
> A. Where did I learn of his name?
> Q. Yes. A. From Bove.
>
> The Court: Tell him the whole story. Where did you learn it?
>
> The Witness: From the photos in the police gallery, the Bureau of Criminal Identification, New York City Police Department.

Defense counsel made no objection to this testimony. Later, upon recross-examination of Agent Peterson, the following exchange occurred:

> Q. Since 1958 to 1961 the only time you have seen this defendant other than that night was in the court room? A. In flesh and blood.
>
> The Court: Well, have you seen him in any other way?
>
> The Witness: Photographs.
>
> The Court: Where?
>
> The Witness: At the Federal Bureau of Narcotics.

The defense immediately moved for a mistrial, which was denied. Appellant asserts that these references to pictures of him in the files of the New York City Police Department and of the Federal Bureau of Narcotics were prejudicial errors.

This testimony, given in answer to an inquiry by the court, was properly admitted. Testimony about the defendant's criminal activity is inadmissible if its probative value is merely to show a general criminal disposition on the part of the defendant. But if the testimony serves a further purpose, such as to reveal the defendant's capacity, habit, plan, knowledge, intent, motive, or identity with respect to the crime of which he is charged in the case on trial, the testimony is admissible in spite of its reference to previous criminality. Wigmore, Evidence §217 (3d ed. 1940). In his questions to both narcotics agents upon cross-examination, defense counsel was apparently raising the issue of the wrongdoer's identity. Therefore, although the reference to appellant's pictures in the files of the law enforcement agencies suggested to the jury that the defen-

dant had had previous clashes with the law, it was permissible, inasmuch as the issue had been created by the defense, for the witnesses, in order to explain how they could identify appellant, to testify that the pictures served to confirm their belief that the individual they personally observed was appellant. Cf. *Tucker v. United States*, 214 F. 2d 713 (9 Cir. 1954).

Fourth, appellant complains that the district judge on several occasions during the trial made sarcastic, or otherwise offensive, remarks to appellant and his trial counsel. A trial judge must always remember that he is the personification of our legal system in the eyes of all who are present in his courtroom, and, therefore, it behooves him to act with dignity at all times. We have reviewed the statements of the trial judge which appellant claims to have been improper. Although one or two of his comments would have been better unsaid, the record does not disclose that the judge's remarks obstructed the defense in its efforts to present evidence; and the charge to the jury was eminently fair as to all the disputed issues of law and fact in the case.

There is no merit in appellant's final contention that he is now entitled to a new trial because he was remanded to jail without bail at the outset of his trial. Appellant had the right to appeal this order at the time it was made. Not only did he fail to appeal at the time of his remand but he even failed then to assert any objection to the court's order. Moreover, this issue, raised for the first time on appeal, is inappropriately raised, and the relief requested, a new trial, is inappropriate also.

Affirmed.

APPENDIX B

Constitutional Provisions

AMENDMENT 5, UNITED STATES CONSTITUTION.

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Statutes Involved

United States Code, Title 21, Sections 173, 174:

"**§ 173. Importation of narcotic drugs prohibited; exceptions; crude opium for manufacture of heroin; forfeitures.** It is unlawful to import or bring any narcotic drug into the United States or any territory under its control or jurisdiction; except that such amounts of crude opium and coca leaves as the board finds to be necessary to provide for medical and legitimate uses only, may be imported and brought into the United States or such territory under such regulations as the board shall prescribe, but no crude opium may be imported or brought in for the purpose of manufacturing heroin. All narcotic drugs imported under such regulations shall be subject to the duties which are now or may here-

after be imported upon such drugs when imported. * * *

"§ 174. Same; penalty; evidence. Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

"Whenever on trial for a violation of this subsection the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

(Amendment enacted July 18, 1956, effective on July 19, 1956.)